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No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

QUALITY ALUMINUM PRODUCTS INC., - - - - - - - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 5, 1987

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QUESTIONS PRESENTED

1. Whether the imposition of the bargaining order was an abuse of discretion by the National Labor Relations Board and was not supported by substantial evidence of pervasive or coercive practices such that a fair election is unlikely.

2. Whether the decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of *NLRB* v. *Gissel Packing Co.*, 395 U. S. 515 (1969).

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SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

QUALITY ALUMINUM PRODUCTS, INC. - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Quality Aluminum Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 20, 1987.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Also included in the Appendix are the decisions of the Administrative Law Judge and the National Labor Relations Board.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 20, 1987. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner is a Kentucky, for profit corporation which manufactures and distributes windows, doors, awnings and gutters. Its business is highly seasonal and experiences a severe slump during the winter months necessitating employee layoffs during this period. This action was brought by Respondent alleging that Petitioner threatened the discharge of workers and closure of plant facilities in response to union activities by some employees and that Petitioner allegedly gave the impression of surveillance of such activities, in violation of §8(a)(1), of the National Labor Relations Act, ("the Act"), made discriminatory layoffs in violation of §§8(a)(1) and 8(a)(3), of the Act, and refused to bargain in contravention of §8(a)(5) of the Act.

The administrative law judge (ALJ) found a violation of §8(a)(1) because of the timing of the, layoffs notwithstanding the fact that layoffs had been made in past years during the seasonal "slow down" in the winter months. He ordered backpay and reinstatement and a bargaining order under the aegis of *NLRB* v. *Gissel Packing Company,* 395 U. S. 575 (1969) on the grounds that the Petitioner's actions had a tendency to undermine the union's majority strength and impede the election process. The National Labor Relations Board (NLRB) modified the ALJ's order concerning reinstatement because most of the employees

returned to work after being recalled by Petitioner; the Board also modified the decision concerning the *Gissel* bargaining order premising it on the grounds that the violations were "pervasive" and "extensive" and would "leave a lingering coercive effect on the employees willingness to exercise their protected rights." On March 20, 1987, the Court of Appeals for the Sixth Circuit affirmed the judgment of the NLRB, in a divided decision, holding that the findings of the ALJ were supported by substantial evidence and that the Board did not abuse its discretion in determining that a *Gissel* Bargaining order was an appropriate remedy.* Copies of the decision of the Board and the Circuit Court are attached in the Appendix.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Was Not Supported By Substantial Evidence.

The parties have agreed that Quality Aluminum is engaged in a highly seasonal business activity and must regularly lay off employees during the slack season. All six (6) of the affected employees were recalled with two (2) declining for personal reasons. The administrative law judge conceded as much in his order.

As the Circuit Court dissent observes, the knowledge and anticipation of the seasonal layoffs was "a

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*The dissent opined that the circumstances of the case simply do not support the Board's conclusion that the effects of the alleged unfair practices were pervasive or coercive as to foreclose conducting a fair election or otherwise warrant a bargaining order. (See Dissenting Opinion at p. 5).

factor which motivated the undertaken union activity." (Dissenting Opinion, March 20, 1987, at pp. 4-5). The alleged anti-union statements were made by a mid-level manager who the employees knew well and of whom they had no fear. Nothing in the record supports a conclusion that Quality executives condoned or were aware of the alleged anti-union comments by the supervisor. Because the record does not support the requisite finding of pervasive or coercive practices and that a free and fair election is unlikely, the *Gissel* order enforced herein constitutes an abuse of discretion, and the court should have denied enforcement.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Proper Interpretation of *NLRB* v. *Gissel Packing Co.*, 395 U. S. 515 (1969).

The circuit courts have adopted divergent interpretations of the application of the *Gissel* criteria particularly with regard to "category two (2)" cases, such as this action, which cannot be reconciled.

Disagreement within and among the circuit courts results from the apparent contradiction between the bargaining order's twin goals of preventing employer misconduct and effectuating employee free choice. *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 614 (1969). Even a cursory sampling of circuit court decisions indicates the failure of the circuits to develop and apply a consistent standard of review to determine whether the Board's issuance of bargaining orders conforms to the standards announced in *Gissel*.

For example, the Third Circuit is split over the courts proper role in the reviewing bargaining order decisions. In a divided opinion styled *NLRB* v. *K&K Gourmet Meats, Inc.*, 640 F. 2d 460 (3rd Cir. 1981), the Court refused to enforce a bargaining order holding that a *Gissel* order is an extraordinary remedy operating to disenfranchise workers in the choice of their representative (*Id.* at 470). The majority in *Gourmet Foods* held that the Board's traditional remedies were sufficient to ensure a fair determination of employee sentiment.

However, the dissent observed that the "specificity" requirement was used to deny enforcement of bargaining orders on the grounds that adequate review was not possible and that given the majority's holding, court enforcement of bargaining orders was doubtful under any circumstances (*Id.* at 473).

In contrast the Third Circuit in *NLRB* v. *Permanent Label Corp.*, 657 F. 2d 512 (3rd Cir., 1981) (en banc), emphasized the deterrence of employer misconduct and enforced the bargaining order focusing on the severity of the employer's unfair labor practices, rather than on the reasons why a fair election was impossible (*Id.* at 520-21). The majority found that the Board correctly complied with the specificity requirement by concluding that the employer's violations were widespread and the employer would violate the Act to resist unionization. (*Id.* at 520.) The dissent argued that the Board did not satisfy the specificity requirement and that under a "category two" inquiry *Gissel* requires a determination that the employer's conduct im-

pedes the election process. The dissent also criticized the Board's failure to address whether the employer's unfair labor practices would recur. (*Id.* at 533).

The Fourth Circuit in *NLRB* v. *Maidsville Coal Co., Inc.,* 693 F. 2d 1119 (4th Cir. 1982) held that a category two analysis under *Gissel* requires the Board to consider why traditional remedies will not erase the damage occasioned by the employer's unfair labor practices. In *Maidsville* the employer violated §8(a)(3) of the Act by illegally discharging employees, yet the court refused to enforce the Board's bargaining order on the grounds that the Board's "conclusory language" was not specific and did not provide detailed reasons why an election would not reflect employee preferences fairly. (*Id.* at 1123). (See also *NLRB* v. *Appletree Chevrolet, Inc.,* 608 F. 2d 988 (4th Cir. 1979). However, in a subsequent case, the 4th Circuit, inconsistent with the foregoing, concluded in *Standard-Coosa-Thatcher Carpet Yarn Division, Inc.* v. *NLRB,* 691 F. 2d 133 (4th Cir. 1982) that deference to the Board's judgment in bargaining order cases is appropriate unless the Board's decision rests on insubstantial evidence or erroneous legal standards and that the ultimate choice of an appropriate remedy remains within the province of the Board.

The dissent in *Standard-Coosa-Thatcher* criticized the majority's unexplained departure from the prior application of the specificity requirement under the *Appletree* and *Permanent Label* decisions and that the Board failed to demonstrate that a fair election was not possible. *Id.* at 1146.

The Seventh Circuit enforces bargaining orders only when the Board expressly considers the possibility of holding a fair election. *Red Oaks Nursing Home, Inc.* v. *NLRB,* 633 F. 2d 503 (7th Cir. 1980). The *Red Oaks* case reaffirms the principle, in the 7th Circuit, that when the Board fails to make the detailed findings justifying a bargaining order, the court will favor an election as the preferred means of determining employee desires to enter into collective bargaining. However, in *Justak Brothers & Co., Inc.* v. *NLRB,* 664 F. 2d 1074 (7th Cir. 1981) the same circuit upheld a bargaining order based on its reasoning that the Board adequately considered the remedial value of traditional remedies in measuring the impact of the employer's misconduct on the election process.

The First Circuit has also expressed dissatisfaction with the Board's failure to comply with the specificity requirement by refusing to enforce bargaining orders that fail to make the necessary analysis (See *NLRB* v. *Pilgrim Foods, Inc.,* 591 F. 2d 110, 120 (1st Cir. 1978) (noting that the court may analyze the record to determine the propriety of a bargaining order when the Board's findings are inadequate).

In sharp contrast to the specificity analysis employed by 1st, 3rd, 4th, and 7th Circuits, the 8th Circuit and D.C. Circuit still defer to the Board's determination of the propriety of a bargaining order. See *Abie Mineral Feed Co.* v. *NLRB,* 438 F. 2d 940 (8th Cir. 1971). See *Amalgamated Clothing Workers* v. *NLRB,* 527 F. 2d 803, (D.C. Cir. 1975) cert. den. 426 U. S. 907 (1976); *John Cuneo, Inc.* v. *NLRB,* 681 F. 2d 11 (D.C.

Cir. 1982). In *Cuneo* the court stated that *Gissel* did not require that the Board find only that a bargaining order would suffice but merely that a bargaining order better protects employees expressed union preference (*Id.*, at 24). This interpretation appears to be the premise of the majority opinion in the herein case.

These disparate results in bargaining order cases reflect the Board's failure to develop consistent bargaining order guidelines and the circuit courts' inability to apply a consistent analysis in reviewing such orders. The decision sought to be reviewed here typifies the conflict within and among the Circuit Courts. The increased use of bargaining orders has heightened the Board's conflict with the circuit courts over the correct interpretation of the Supreme Court's decision in *Gissel* (See *NLRB* v. *Chester Valley, Inc.*, 652 F. 2d 263 (2d Cir. 1981) (circuit courts note the increasing number of bargaining orders issued by the Board).

As shown above and in the case at bar there are widely divergent views within and among the circuit courts concerning the degree to which *Gissel* requires the Board to expressly consider the impact of the employer's misconduct on the election process. The division within and among the circuit courts between emphasizing the need to deter employer misconduct and the need to protect employees free choice exacerbates the uncertainty surrounding the proper use of the bargaining order remedy.

The split within and among the circuits over the proper application of the specificity requirement has created an environment in which the employer's proba-

bility of successfully challenging the Board's order depends on which circuit court (or even which circuit judges) reviews the decision. (See *NLRB* v. *K&K Gourmet Meats,* 640 F. 2d 460, 470 (3rd Cir. 1981) (Gibbons, J. dissenting) (Third Circuit decisions indicate that certain judges have signalled the Board that bargaining orders are unwelcome in Third Circuit). The divergent interpretations of *Gissel* bargaining order cases and criticism among the circuits, particularly with respect to category two (2) cases, such as the instant action, requires Supreme Court review and clarification.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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June 5, 1987

APPENDIX

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

QUALITY ALUMINUM PRODUCTS, INC., - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent*

CERTIFICATE OF SERVICE

* * * * * * * *

I hereby certify that on this ____ day of June, 1987, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to Hon. Elliott Moore, Hon. Helen Morgan, and Hon. David A. Fleischer, Office of the General Counsel, National Labor Relations Board, Room 1200, 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570, Counsel for Respondent. I further certify that all parties required to be served have been served.

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-5268 & 86-5343

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner, Cross-Respondent,* v. QUALITY ALUMINUM PRODUCTS, INC., *Respondent, Cross-Petitioner.*	ON APPLICATION for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.

Decided and Filed March 20, 1987

Before: ENGEL and KRUPANSKY, Circuit Judges; and SPIEGEL,* District Judge.

The court delivered a PER CURIAM opinion. KRUPANSKY, Circuit Judge, (pp. 4-5) delivered a separate dissenting opinion.

PER CURIAM. This matter is before the court on cross-petitions to review and enforce an order of the National

*The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

Labor Relations Board determining that Quality Aluminum Products had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3) and 158(a)(5). The Board's opinion is reported at 278 N.L.R.B. No. 49.

Quality Aluminum is a manufacturer and distributor of windows, doors, awnings, and gutters. Its business is seasonal, and normally requires employee layoffs during the winter. In November 1982, some employees of Quality Aluminum signed union authorization cards and wore buttons favoring a union. The Board alleges that from the date these buttons were worn, and continuing for approximately one week, Quality Aluminum threatened the discharge of workers and closure of the plant because the employees had engaged in union activities, and gave the impression of surveillance of such activities, all allegedly in violation of section 8(a)(1), made discriminatory layoffs for engaging in union activities, in violation of sections 8(a)(1) and 8(a)(3), and refused to bargain, contrary to section 8(a)(5). There is no dispute regarding which employees were laid off.

The administrative law judge found that all the laid off employees were union supporters. He found a violation of section 8(a)(1) because the employees who openly supported the union were swiftly laid off. Although in years past layoffs had been made, and might have been made in 1982 at some point, the normal procedures for making layoffs were not complied with that year. The administrative law judge ordered reinstatement and backpay, and a bargaining order pursuant to *NLRB* v. *Gissel Packing Company,* 395 U. S. 575 (1969), not on the grounds that the unfair labor practices in this case were pervasive, but that the company's actions had a tendency to undermine the union's majority strength and impede the election process. The Board modified the administrative law judge's

order concerning reinstatement because of the reemployment of some of the employees, and based the *Gissel* bargaining order not on the administrative law judge's rationale, but on the ground that these violations were extensive and pervasive, and would leave a lingering coercive effect on the employees' willingness to exercise their protected rights.

On appeal, Quality Aluminum challenges the Board's findings that the employees were laid off because of their union activities, that they were threatened, and that the majority of the employees had designated the union to be their collective bargaining representative, as well as the propriety of the Board's *Gissel* bargaining order.

Upon consideration, the court is of the opinion that substantial evidence supports the finding of the administrative law judge as modified by the decision of the Board. We further conclude that the Board did not abuse its discretion in determining that a bargaining order was the appropriate remedy under *NLRB* v. *Gissel Packing Company, supra.*

Accordingly, for the reasons set forth in the decision of the Board above cited, the order of the Board is enforced, and the petition of the respondent is DENIED.

KRUPANSKY, Circuit Judge, dissenting. Considering the deferential standard of review which governs this court's examination of determinations of the National Labor Relations Board (the NLRB or the Board), I could join the majority, although with some reservations, in affirming the Board's finding on this record that the respondent, Quality Aluminum Products, Inc. (Quality), engaged in the charged unfair labor practices. I am constrained to dissent, however, on the basis that the Board's imposition of the extraordinary remedy of a bargaining order, rather than the more traditional relief of directing that a Board-supervised representation election be conducted, consti-

tuted an abuse of discretion unsupported by the instant record which should accordingly be denied enforcement by this court.

It should be noted at the outset that this court exercises less deference to the Board's findings and scrutinizes its decision more closely when it has imposed the very harsh remedy of issuing a bargaining order without having conducted an election. *See Exchange Bank* v. *NLRB*, 732 F. 2d 60, 63 (6th Cir. 1984); *NLRB* v. *Valley Plaza, Inc.*, 715 F. 2d 237, 244 (6th Cir. 1983); *NLRB* v. *Rexair, Inc.*, 646 F. 2d 249, 250 (6th Cir. 1981). Such scrutiny of the record in the case sub judice fails to disclose that the effects of the employer's violations were so pervasive or coercive that they precluded a fair and reliable representation election or otherwise necessitated a bargaining order.

Initially, it was undisputed by all parties that Quality's business was highly seasonal in nature and traditionally evidenced a severe slump during the winter months. As a consequence, the general practice of the company was to lay off a proportionately large number of its relatively small work force in the months of October or November through the spring of the following year. The employees were acutely aware of this practice and that layoffs were imminent during the forthcoming slow season. The issue of seasonal layoffs was a factor which had motivated the undertaken union activity. The administrative law judge conceded that layoffs were inevitable at the facility in question at the time here in issue. In keeping with past practice, all six of the laid off employees were offered employment in the spring, four of whom accepted and two of whom declined for personal reasons. Moreover, with respect to the alleged anti-union statements, such expressions were attributable to a mid-level management employee whose actions were unknown to higher level company officials. Finally, the record reflects that the company and

the union contemporaneously with the challenged layoffs entered into a stipulated, Board-supervised representation election, which was in fact conducted in January of 1983. In sum, the circumstances simply do not support the Board's conclusion that the lingering effects of the rather unexceptional violations at issue herein, which occurred over four years ago, were so pervasive or coercive as to foreclose the conducting of a fair election or otherwise warrant a bargaining order. Accordingly, I would deny enforcement of that section of the Board's imposing a bargaining order rather than mandating an election.

APPENDIX B

278 NLRB No. 49

UNITED STATES OF AMERICA

Before The

NATIONAL LABOR RELATIONS BOARD

Cases 9-CA-19005-1, -2
9-CA-19158-1, -2
9-CA-19434

QUALITY ALUMINUM PRODUCTS, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On 28 March 1984 Administrative Law Judge Russell M. King Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified,[2] and to adopt the recommended Order as modified.[3]

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an ad-

(Footnote Continued on Next Page)

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off six employees because of their union activities, and Section 8(a)(1) by threatening employees with discharge for wearing union buttons, threatening employees with plant closure, and creating the impression of surveillance of union activities. The judge also found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on the basis of a card majority, and recommended that the Board issue a *Gissel*[4] bargaining order. We agree with the judge that such an order is appropriate, but we do not rely on his reasoning.

The judge found that on 22 November 1982 employees Ronald Caffee, Donna Crouch, and Edna Thompson picked

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(Footnote Continued From Preceding Page)

ministrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 12 of his decision, the judge erroneously reported the citation to *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). We correct the error.

[2]We do not rely on fn. 14 of the judge's decision, in which he stated his "initial impressions" about whether employees Brown and Hutchinson should be included in the unit, having previously found it unnecessary to resolve their status.

[3]We shall issue an amended remedy and modify the recommended Order to delete the requirement that the Respondent offer reinstatement to Ronald Caffee, Donna Jean Crouch, Gary Wayne Marshall, Gregory John Burden, and Lydia Houchens, because the record shows that Caffee, Crouch, Marshall, and Houchens have been offered reinstatement to their former positions and have returned to work, and Burden was offered reinstatement but declined the offer. We shall also issue a new notice to employees.

[4]*NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969).

up union authorization cards from the union hall. Nine employees signed cards 22 November and two 24 November. On 23 November seven employees attended a union meeting. On 24 November most of the employees who signed cards wore union buttons to work.

On 24 November Warehouse Supervisor Charles Fox stated to employee Garland Brown that "these mother—— wouldn't be wearing them buttons if it wasn't for that bitch back there in the back." Brown testified tht Fox was referring to Donna Crouch. Approximately an hour later Fox told Brown that the employees "were fools for signing those union cards." The Respondent laid off Brown at the end of the day.

Also on 24 November employees Gary Marshall, Gary Chamberlain, and Daryl Lemons were in the warehouse when Fox told Lemons that "if he didn't want to jeopardize his job, he'd better take the buttons off." Fox told Marshall that "they'd close the doors, they'd change the name or something like that, if the union did try to come in." When Marshall told Fox he did not think that was possible, Fox said, "Well, now I don't believe it'll get in here . . . I just think that — I believe they'd close the door first." Fox also told Marshall "that he knew that everybody—who—the ones that signed it." Employee Caffee heard Fox tell Chamberlain and Marshall on 24 November that "if the union came through, he [Fox] heard they was going to shut the doors down."

Donna Crouch picked up union cards 22 November and passed them out to other employees. Crouch signed a card and attended the union meeting 23 November. She wore two union buttons 24 November and was laid off that day.

Garland Brown Jr. signed a union card 22 November, attended the 23 November union meeting, and wore two union buttons 24 November when he was laid off.

On 24 November Gregory Burden signed a union card, wore a union button, and was laid off.

Ronald Caffee picked up union cards on 22 November and passed some out to other employees. He attended the 23 November meeting and wore a union button 24 November. Gary Marshall attended the union Meeting 23 November and wore a union button. He was laid off 29 November.

Lydia Houchens signed a card 22 November, attended the 23 November union meeting, and wore a union button 24 November. She was laid off 1 December.

On 24 November there were approximately 17-19 employees in the unit, of whom 10 or 11 had signed cards.[5]

The Respondent's violations were extensive in number and pervasive in terms of the number of bargaining unit employees they affected. The unlawful layoffs and threats of job loss and plant closure are highly coercive violations directed against employees working in a small unit (17-19 employees). The Respondent unlawfully laid off 6 of 18 or 19 or 5 of 17 or 18 unit employees (approximately 30 percent of the unit). Three employees (Marshall, Chamberlain, and Lemons) heard the supervisor threaten job loss. Three employees (Marshall, Chamberlain, and Caf-

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[5]The judge found it unnecessary to pass on whether employees Brown and Hutchinson should be included in the unit. If both employees are included in the unit, then 6 of 19 unit employees were discriminatorily laid off. If both employees are excluded from the unit, then 5 of 17 unit employees were laid off. We find it unnecessary to pass on the status of Brown and Hutchinson because, for purposes of determining the impact of the violations in assessing the propriety of a bargaining order, the proportion of laid-off employees to unit employees is approximately the same (about 30 percent) whether or not they are included in the unit. If Brown is included in the unit, 11 employees signed cards; if not, 10 did.

fee) also heard the threat of plant closure. Of the employees who heard the threats, two (Chamberlain and Lemons) were not laid off. Thus, the Respondent's violations directly affected 8 of 18 or 19 or 7 of 17 or 18 unit employees (approximately 41 percent).

The threat of job loss, immediately followed by layoffs, demonstrated to substantial proportion of unit employees the Respondent's willingness to carry out its threats. The swiftness and timing of the unfair labor practices (occurring the day the employees first openly showed their union support) demonstrated that the penalty for union support would be severe. Employee Houchens testified that, as a result of the layoffs the previous week, the employees stopped wearing union buttons on 29 November.

In determining whether a bargaining order is appropriate, in addition to examining the severity of the violations committed, the Board also examines the present effects of the coercive unfair labor practices. In the instant case, we find that the seriousness and pervasiveness of the violations had a lingering coercive impact on the employees in this small unit that would not be dissipated by the offers of reinstatement made approximately 4 to 7 months after the layoffs. Thus, four of the six laid-off employees are currently working in the unit, as well as one of the two other employees who heard the threats but were not laid off. It is reasonable to assume that the four employees, once having been laid off for their union activities, would be "painfully aware that future support of a union could lead to the same end:"[6] This is particularly true in the case before us in which the seasonal nature of the Respondent's business renders additional layoffs probable. The Respondent attempted, and is still attempting, to

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[6] *Exchange Bank*, 264 NLRB 822, 824 fn. 14 (1982), enfd. 732 F. 2d 60 (6th Cir. 1984).

disguise its discrimination against one-third of the unit as a "seasonal" layoff. With future seasonal layoffs likely, the Respondent's employees have reason to fear a recurrence of a similar attempt.

The Respondent's union animus was demonstrated by its supervisor's threats of job loss and plant closure made immediately on his becoming aware of the employees' union activity. Since the same supervisor is also responsible for selecting which warehouse employees are to be laid off each winter, it is likely that the employees would hesitate before renewing their organizational drive. There is no evidence that the Respondent has told employees that it disavows the supervisor's threats, and there has been no change in management. There is no indication of any change in policy. Thus, the employees may reasonably expect that the Respondent may again resort to illegal means to defeat union representation.[7] The Respondent's union animus and the lengths to which it was willing to go to thwart unionization remain obvious to the employees. Because of the swiftness and severity of the Respondent's retaliation against union organizers and supporters, it is unlikely that employees would again be readily willing to jeopardize their employment by openly supporting the Union. Under such circumstances, we believe that the threat of future layoffs will tend to continue to undermine majority support and prevent holding a fair election.

As this arises in the Sixth Circuit Cour of Appeals, we note that the Sixth Circuit, in enforcing the Board's bargaining order in *Exchange Bank, supra* at 63, recognized that a cease-and-desist order is not always sufficient to remedy an employer's unfair labor practices. The court quoted *Gissel,* 395 U. S. at 612, as follows:

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[7]*Captain Nemo's,* 258 NLRB 537, 555 (1981), enfd. 715 F. 2d 237 (6th Cir. 1983).

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.

We believe that, under the circumstances of the instant case, simply requiring the Respondent to refrain from unlawful conduct will not eradicate the lingering effects of the hallmark violations, and will not deter their recurrence.

The Respondent contends that a bargaining order is not justified in the instant case because the layoffs were temporary (the employees were recalled between 4 and 7 months after the layoffs). The Respondent also argues that the supervisor who made the threats was a friend of one of the employees who heard the remarks and thus no threatening atmosphere resulted. We have previously discussed the impact of the layoffs. With regard to the second contention, it is well settled that the test of interference, restraint, and coercion under the Act does not turn on the Respondent's motive. *Hanes Hosiery,* 219 NLRB 338 (1975).

We are mindful that almost 3 years have passed since the Respondent engaged in its unlawful conduct. When we consider, however, the serious nature of the conduct which consisted of threats of discharge and plant closure, discriminatory layoff of one-third of the unit, and creation of the impression of surveillance, we are convinced that the lasting effects of such conduct cannot easily be eradicated by the mere passage of time.[8] The passage of time, though

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[8] *Exchange Bank, supra* at 824.

regrettable, is unavoidable, and is not a sufficient basis for denying the bargaining order.

We believe that on balance, in light of the violations' seriousness and pervasiveness, the unit's small size, the substantial percentage of unit employees the Respondent's threats and layoffs directly affected, the majority of whom are still employed at the Respondent's facility, and the strong possibility of repetition of similar unfair labor practices because of the seasonal nature of the Respondent's business, the equities in this case favor the issuance of a bargaining order.[9] Under the circumstances, we find that

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[9]Member Dennis agrees that a bargaining order is an appropriate remedy under *NLRB* v. *Gissel Packing Co., supra,* for the following reasons. See her concurring opinion in *Regency Manor Nursing Home,* 275 NLRB No. 171 (July 31, 1985).

In the instant case the Respondent committed extensive "hallmark" violations, consisting of the layoff of six employees, and threats of plant closure and discharge. See *NLRB* v. *Jamaica Towing,* 632 F. 2d 208 (2nd Cir. 1980). In a unit of 17 - 19 employees, 7 or 8 employees (approximately 41 percent) were directly affected by these highly coercive unfair labor practices. In view of the unit's small size, the layoff of one-third of the unit was likely to have a profound impact on all employees. *Horizon Air Services,* 761 F. 2d 22 (1st Cir. 1985); *NLRB* v. *Solboro Knitting Mills,* 572 F. 2d 936, 944 (2d Cir. 1978), cert. denied 439 U. S. 864 (1978).

The Respondent's pervasive hallmark violations justify a bargaining order, absent significant mitigating circumstances. There had been some turnover in the unit at the time of the hearing. Thus, there were approximately six new employees in the warehouse department. However, five employees directly affected by the Respondent's hallmark violations were still working in the unit at the time of the hearing. Member Dennis does not consider such turnover significant in light of the continuing presence of the unit of a number of employees directly affected by the hallmark violations. The 3-year passage of time between the events of this case

(Footnote Continued on Next Page)

the unfair labor practices involved in this case would tend to undermine the Union's majority status and impede the election process. We conclude that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."[10]

REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5), we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent has already offered Gregory Burden, Donna Crouch, Ronald Caffee, Gary Marshall, and Lydia Houchens reinstatement to their former positions. Crouch, Caffee, Marshall, and Houchens have returned to work. Burden declined his offer of reinstatement. Accordingly, we shall order the Respondent to offer only Garland Brown Jr. immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed.

We shall also order the Respondent to make whole all six employees for any loss of earnings and other benefits they may have suffered as a result of the discrimination

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and our decision is unfortunate but insufficient to deny a bargaining order. *NLRB* v. *Pacific Southwest Airlines,* 550 F. 2d 1148, 1153 (9th Cir. 1977); *Exchange Bank,* 264 NLRB 822, 824 fn. 13 (1982), enfd. 732 F. 2d 60 (6th Cir. 1984). Accordingly, Member Dennis joins her colleagues in issuing a bargaining order.

[10] *Gissel,* 395 U. S. at 614 - 615.

against them, by paying them an amount equal to that they would have earned from their layoff dates to the dates of their reinstatement or offer of reinstatement, less net interim earnings, if any, with backpay and interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The Respondent may offer evidence at the compliance stage to prove that any of the six laid-off employees would have been legitimately laid off subsequent to their discriminatory layoff, in mitigation of backpay due under the terms of this Decision and Order.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act as of 24 November 1982, we shall order it to cease and desist and to recognize and bargain on request with the Union as the exclusive bargaining representative of the unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Quality Aluminum Products, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Garland Brown Jr. immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Ronald Caffee, Donna Crouch, Gary Marshall, Gregory Burden, Garland Brown Jr., and Lydia Houchens whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 31 January 1986

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or otherwise discriminate against any of you for supporting General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

WE WILL NOT create in your minds the impression that your union activities and the union activities of other employees are the subject of company surveillance.

WE WILL NOT threaten to discharge you because of your union support or activities.

WE WILL NOT threaten you with closure of the Louisville, Kentucky facility if you engage in union support or activity.

WE WILL NOT refuse to bargain with the Union as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any other maner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Garland Brown Jr. immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Caffee, Donna Jean Crouch, Gary Wayne Marshall, Gregory John Burden, Garland Brown Jr., and Lydia Houchens whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production, maintenance, warehouse, and truck driving employees employed at our Louisville, Kentucky facility; but excluding all office clerical, professional, and all other employees, and all guards and supervisors as defined in the Act.

QUALITY ALUMINUM PRODUCTS, INC.

_____

(Employer)

Dated_____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3003 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3663.

APPENDIX C

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

Case Nos. 9-CA-19-005-1, -2
9-CA-19158-1, -2
9-CA-19434

QUALITY ALUMINUM PRODUCTS, INC. - - - - - - - *Respondent Employer*

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA - - - - - - *Charging Union*

Deborah Jacobson, Esq.,
and *Jack Baker, Esq.,*
of Cincinnati, OH,
for the General Counsel.

Joseph A. Worthington, Esq., and
W. Kevin Smith, Esq.
(Smith and Smith), of Louisville, KY,
for the Respondent Employer.

Ralph H. Logan, Esq., of Louisville, KY,
for the Charging Union.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge: These consolidated cases were heard by me in Louisville, Kentucky on June 13, 14, and 15, 1983. The charges in the various cases were filed by the Charging Union (the "union") on various dates in December, 1982, January, 1983, and March, 1983.[1] The consolidated complaint was issued on April 18, 1983 by the Regional Director for Region 9 of the National Labor Relations Board, (the "Board") on behalf of the Board's General Counsel.[2] The complaint alleges that the Respondent Employer (the "company") violated Section 8(a)(1) of the National Labor Relations Act (the "Act") in late November, 1982 by threatening employees with discharge and plant closure for engaging in union activities and by giving the impression of surveillance of such activities.[3] The complaint further alleges the unlawful and discriminatory layoff of six employees in late November and early December because of their union activities, in violation of Section 8(a)(1) and

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[1]The charges in Case No. 9-CA-19005-1, -2, were filed by the union on December 2, 1982; the charge in Case No. 9-CA-19158-1 was filed on January 10, 1983; the charge in Case No. 9-CA-19158-2 was filed on January 17, 1983; and the charge in Case No. 9-CA-19434 was filed on March 14, 1983.

[2]The term "General Counsel", when used herein, will normally refer to the attorneys in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[3]All dates hereinafter are in 1982 unless otherwise stated. The original complaint contained two such allegations, occurring on November 24 and 28. By amendment during the hearing, two additional and similar allegations were added to the complaint, both occurring in November 24.

(3) of the Act. Lastly, the complaint alleges that the company refused to recognize and bargain with the union after it had obtained a union authorization card majority from the appropriate unit of employees involved, in violation of Section 8(a)(1) and (5) of the Act.[4]

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel, counsel for the company and counsel for the union, I make the following:

FINDINGS OF FACT[5]

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[4]The pertinent parts of the Act (29 U.S.C. 151 *et seg.*) are as follows:

> Sec. 8 (a) it shall be an unfair labor practice for an employer —(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (5) to refuse to bargain collectively with the representative of employees. . .
>
> * * *
>
> Sec. 7. Employees shall have the right to self-organization, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

[5]The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company*, 369 U. S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their

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I. Jurisdiction

The pleadings and admissions filed and made herein reflect the following facts regarding jurisdiction. At all times material herein, the company has been a Kentucky corporation with an office and place of business or plant in Louisville, Kentucky, where is has been engaged in the manufacture and sale of aluminum doors and windows. The company operates several other facilities, but the Louisville plant is the only facility involved in this case. During the 12 month period immediately preceding the issuance of the complaint herein, the company in the course and conduct of its business operations sold and shipped from its Louisville, Kentucky plant products, goods and materials valued in excess of $50,000 directly to points outside the State of Kentucky. Thus I find, as alleged and admitted herein, that the company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Further, and as alleged and admitted herein, I find that the union is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Background*

The unit of employees involved in this case contains the production, maintenance, warehouse and truck driving

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testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

employees at the company's plant. On November 22 employees Ronald Caffee, Donna Crouch and Edna Thompson went to the union's headquarters or meeting hall during their lunch break at the plant and obtained a number of union authorization cards. At that time there were some 19 employees in the unit. On that date at least nine employees signed on November 24. On November 23, seven employees attended a meeting at the union hall and apparently obtained union buttons. The following morning (November 24) most of or all employees who had signed union authorization cards appeared for work at the plant wearing union buttons. At the end of the work day on November 24, three of the union supporters were laid off. The following day (November 25) was Thursday, Thanksgiving Day, and the employees had that day off, and also Friday, November 26. November 29, the following Monday, two other union supporters were laid off and another one was laid off on December 1. Also on November 24, the union wrote a letter to the company stating that "Your employees have voluntarily joined" the union, and requested recognition as the exclusive bargaining representative of the employees. Thereafter the company refused to so recognize the union, who then filed a Petition for Representation (Case No. 9-RC-14186). On December 22, the company and the union entered into a Stipulation for Certification upon Consent Election in Case No. 9-RC-14186 and on January 18, 1983 a Board-conducted election was held at the company's plant.[6] Most, if not all of the employees who were laid off were later reinstated after what the company described as the winter slump in business. It was stipulated by the parties in this case that the company "is engaged in sea-

[6]After the election, Objections to the Conducts of Election were filed, and at the time of the hearing in this case, those Objections were pending before the Regional Director.

sonal business and has had layoffs in prior years." The company contends that the employees were laid off in the normal routine of a seasonal slack in business, and further argues that the company's business over the past year or so had fallen off significantly because of the economic conditions then prevailing. The General Counsel argues that the layoffs were prompted by the activities of those employees in support of the union.

B. *Plant Organization*

The company was owned by its president and sole stockholder, James O'Neil. O'Neil's primary duties involved the purchasing of raw materials used at the plant and the selling of finished products to contractors and distributors. He was not involved in the day-to-day operations at the plant, but was present on November 24. Responsibility for the day-to-day operations at the plant was vested in the company's vice-president, Ed Cochran, who was not present on the 24th and was on vacation from November 24 to December 5. The plant was divided into two operations which included the production department and the warehouse operation. Sandra Young, whose last name was Hamm at the time that the complaint issued, was the supervisor of the production department. She also was not present on November 24 and returned from her vacation on November 29. Peggy Hutchinson assisted Young in the production department. There is a dispute in this case as to whether or not Hutchinson was a supervisor within the meaning of the Act. Hutchinson testified that she was hired as an assistant foreman but that in reality she acted as a floating employee in the production department, helping to insure that work kept moving. Hutchinson was present on November 24. The warehouse operation was supervised by Charles Fox who was also present on November 24.

The company made no retail sales, and as indicated earlier, the company's business was somewhat seasonal with its slack period during the winter months.

C. *The Alleged Threats and Surveillance*

Paragraph 5 of the consolidated and amended complaint alleges that supervisor Charles Fox violated Section 8(a)(1) of the Act in four separate incidents, three on November 24 and one on November 28. In his testimony, Fox generally denies all of the alleged unlawful remarks or threats. In support of these allegations in the complaint, the General Counsel relies on the testimony of employees Garland Brown, Ronald Caffee and Gary Marshall. When these three employees reported for work on November 24 at approximately 7:00 a.m. they, along with most other union supporters, were wearing union buttons. In fact, Brown wore two such buttons. When Fox saw that the employees were wearing union buttons early in the morning of November 24, he immediately reported this fact to O'Neil who, according to Fox, instructed him not to say anything about the union.

Employee Garland Brown testified as to several conversations he had with Fox. Only the two were present and according to Brown the first conversation took place at approximately noon on November 24 when Fox stated that "these mother—— wouldn't be wearing them buttons if it wasn't for that bitch back there in the back." Brown indicated that Fox was referring to employee Donna Crouch. Brown related that the second conversation took place approximately one hour later in his work area when Fox told him that "[the employees] were fools for signing those union cards." Brown was laid off by Fox at quitting time that day at 3:30 p.m. Employee Gary Marshall testified that he and employees Gary Chamberlain and Daryl

Lemons were standing together in the warehouse when he overheard supervisor Fox tell Lemons that "if he didn't want to jeopardize his job, he'd better take the buttons off." Lemons did not testify in the case. Marshall further testified that "later on that week" and in the gutter department where he worked, he and Fox were discussing the union and Fox stated that "they'd close the doors, they'd change the name or something like that, if the union did try to come it." Marshall indicated that he told Fox he didn't think that was possible and Fox replied, "Well, now I don't believe it'll get in here . . . I just think that—I believe they'd close the door first." Marshall testified that he and Fox were good friends and that they talked at work "all the time." Further, and according to Marshall, "sometime during [the] week, when the cards was signed", Fox told him "that he knew that everyone—who—the ones that signed it", referring to union authorization cards. Employee Ronald Caffee testified that he overheard some of the conversation between Fox, Chamberlain and Marshall in the gutter room on November 24, when he was walking by to get some materials. Specifically, Caffee testified that he heard Fox state at that time that "if the union came through, that he [Fox] heard they was going to shut the doors down." Marshall mentioned nothing of this remark having been made at that particular time in the gutter room and, as indicated earlier, places this remark by Fox generally sometime during the week.

In defense of the alleged remarks by Fox, the company relies on Fox's general denial, and on the testimony of employee Gary Chamberlain. Chamberlain had been employed since July 1980 and worked in the warehouse under supervisor Fox. Chamberlain was admittedly against the union and indicated that he had never been laid off since his employment commenced. Chamberlain testified that on the morning of November 24 at approximately 7:00

a.m. and while the two were near the timeclock, he warned employee Marshall by stating to him that "you've got a wife, a baby and one on the way, and what do you want a union in here for, you'll be burning wood in a barrel out front, next month." Chamberlain related that he later heard employee Marshall attribute these remarks to Fox and that he "wanted to clear [his] supervisor", and thus came forward voluntarily to testify in the case. Marshall as earlier indicated, places the remarks by Fox in the gutter room later on in the day at approximately noon.

In my opinion, the testimony of employee Chamberlain does nothing to disprove Fox's remarks as related by Marshall, Brown and Caffee, Chamberlain may well have made his claimed remarks to Marshall in the timeclock area at about 7:00 a.m. on November 24. However, Marshall's testimony was definite and straightforward in placing Fox's remarks at about noon in the gutter room. The testimony of employee Ronald Caffee also corroborates the fact that Fox's statement to Lemons, in the presence of Marshall and Chamberlain occurred in the gutter room later on in the day. Further, Chamberlain's recount of his conversation with Marshall early in the morning did not include the presence of Fox. Regarding the alleged improper remarks by Fox, I credit the testimony of Brown, Marshall and Caffee over that of Fox, himself. Brown's demeanor reflected that he was a proud man and while testifying, he appeared in obvious discomfort. Whether this discomfort was attributal to Brown's on-the-job injury which necessitated the receipt of light duty at the plant, or because of the somewhat distasteful business of testifying under oath, was not readily apparent at the hearing. However, in my opinion, Brown's veracity was obvious and definite. Employee Marshall's demeanor was that of a tall and somewhat quiet individual, but also proud and truthful. Although Marshall

was uncertain as to the exact date during the week on which Fox indicated that the company would close its doors if the union came in, in my opinion this uncertainty did not distract from his honest certainty that the remark was indeed made. Employee Ronald Caffee was relatively young in age but displayed a certain honest nervousness during his testimony which also led me to conclude that he was truthful. Supervisor Fox on the other hand had been the warehouse foreman for approximately 2½ years and although fairly young and also somewhat soften spoken, the matter-of-fact manner of his testimony in defense of himself and the company, and his overall demeanor led me the conclude that his veracity was lacking in promptly and summarily denying the damaging remarks which he was alleged to have made. These denials came in rapid fire "No" answers to the rapid fire questions of counsel put in question form as the whether or not he made such remarks. Although one cannot fault the fact that he was a "company man", I conclude that Fox's desire to maintain his job and his supervisory position clouded his ability to be completely truthful in his testimony.

I thus find that the remarks attributable to Fox by Brown and Marshall on November 24 were in fact made and that they in fact constituted unlawful threats of discharge for engaging in proper and lawful support of the union. I also find that the remarks constituted an unlawful threat of plant closure because of union activity and also implied that the company was keeping the employees' union activities under surveillance. I find further that Fox's remark to Marshall about the company closing its doors if the union came in was also made on November 24 as alleged in the complaint, and not on November 28, and although Marshall was somewhat uncertain as to the date, I am convinced that the remark was made. Accordingly, I find and conclude that the company, through Supervisor

Fox, violated Section 8(a)(1) of the Act as alleged in paragraph 5 of the consolidated and amended complaint.

D. *The Economic Situation of the Company and the Seasonal Nature of the Business*

The company maintained three facilities located in Indianapolis, Indiana, Lexington, Kentucky and Louisville, Kentucky, the facility directly involved in this case. The testimony primarily from the company's president, James B. O'Neil, and the company's CPA William P. Schmitz, together with the financial data and documents admitted through Schmitz, reveals that the company's financial posture was poor and that it had deteriorated significantly over the past several years. This deterioration appeared to be the direct result of existing economic conditions which resulted in significantly fewer orders and mounting bad debts, many of which were clearly uncollectible. The company's fiscal year ends February 28 and as an example of the deterioration in business, sales for the Louisville facility in fiscal year 1979 amounted to approximately $4,200,000, but for fiscal year 1982 sales for the Louisville facility dropped to $2,400,000. For the fiscal year 1982, there was some $447,000 in bad debts written off for all three facilities, the majority of which were attributable to the Louisville facility. In January 1982, Mr. O'Neil took himself off of the company's payroll and from that time forward to the date of the hearing, he had not drawn any salary from the company. Also during 1982 O'Neil liquidated his personal retirement account in the amount of $88,000 and poured it into the business, contrary to the firm advice of accountant Schmitz. He also sold his personal residence and poured those funds into the company. The company also supplied materials to several contractors who were involved with construction and remodeling work

at Fort Knox, Kentucky and sometime in October or November of 1982, Government funds apparently ran out for these projects and orders were either canceled or ceased. It would be fair and accurate to say that if there was a fall peak in the company's business it came in October and November of 1982, dropping off sharply in December through at least March 1983. The company produced windows, awnings, shutters, doors, and gutters. An exception to this so-called fall peak in business can be found in gutters, dropping from 13,822 feet in September to 7,397 feet in November. As indicated earlier, the parties stipulated that the company's business was seasonal and that there were seasonal layoffs. The evidence in the case indicates that the slack period was from December through at least March.

E. *The Layoffs*

The company argues in this case that the layoffs were for seasonal and economic reasons, and that for various reasons, each individual that was laid off was chosen over others for various specific reasons, including ability, the amount of work to be done in the production department, and the need for a particular job handled by a specific employee. Seniority was not the controlling factor. The General Counsel argues that the employees were laid off because of their union support and activities.

Three employees were laid off at the end of the work day on November 24, the day in which the union buttons first appeared. They were Donna Crouch, Garland Brown, Jr., and Greg Burden. Crouch began working for the company in July 1979. She quit 10 months later but came back November 1, 1980. She was laid off January to April 1982. She also attended the November union meeting. Crouch worked in the production department and indicated she

received her instructions from Peggy Hutchinson, who sometimes worked along with her. Crouch testified that she could make 10 to 15 "stock" doors per day whereas employee Ron Caffee could build only 5 or 6 per day. Crouch added that at the time she was laid off they were busy in doors and the stock in doors was down. It was Crouch, along with employees Edna Thompson and Ron Caffee, who picked up union authorization cards during their lunch break on November 22. Back at the plant, Crouch passed out some five union authorization cards which were either signed in her presence or later signed in the presence of other employees.[7] On the morning of November 24 Crouch came to work wearing two union buttons, and referring to Crouch, supervisor Fox later in the day made a disparaging remark to employee Garland Brown, indicating that she was a "bitch" for handing out union buttons. It was Fox who laid Crouch off. The company's vice-president John Edward Cochran left for his vacation on November 24 and returned December 6. Cochran testified that prior to leaving he told his supervisors, apparently referring to Fox and Peggy Hutchinson, who was supervisor Young's assistant, to start laying off employees as things had really gotten bad. Cochran testified that the son of the company's president, O'Neil was also subsequently laid off. Cochran further testified that during the winter months, production is built back up at the plant. The production department's supervisor Sandra Young was not present at the plant on November 24, and testified that she and Peggy Hutchinson would get together about layoffs and that she made the decision to layoff

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[7]All six of the employees who were laid off had signed union cards and in addition six other employees also signed union cards either on November 22 or on November 24. The card of employee Cathy Thixton was subsequently lost.

Crouch on November 19 and so instructed Hutchinson to effectuate the layoff on November 24. Young indicated that she decides who and how many to lay off based on which section in her production department is slow, and on performance, usually on the recommendation of Peggy Hutchinson. According to Young, Peggy Hutchinson called her at home on November 24 about the union buttons, explaining that Crouch had brought in union buttons to the plant. According to Young, Hutchinson wanted to know whether, in light of this activity, she would go ahead and lay off Crouch, and Young indicated that she should lay her off as planned. Hutchinson testified that in fact she did lay off Crouch, at the instruction of Young, and also verified that she called Young at home and asked Young whether she should go ahead and lay off Crouch in light of the fact that she brought in union buttons into the plant. Hutchinson testified that she was Young's "assistant", and not an assistant foreman, although she does not punch the timeclock and thus is a salaried employee as opposed to all other production employees. According to Hutchinson, the plant was caught up on doors by November 24.

Employee Garland Brown, Jr. was laid off November 24 by Fox, the warehouse foreman or supervisor. Brown first went to work for the company in August 1981 but was injured on the job in October 1981 and returned to work in May 1982, working on the gate and doing odd jobs that required light duty. Brown testified that during the first week of November he heard rumors in the plant of seasonal layoffs and that he asked Fox, in vice-president Cochran's presence, if he would be laid off and that Fox replied that he would not be laid off because they were short. Fox's version of the incident is somewhat different. Fox testified that on the contrary, he had warned Brown the week before his layoff that he would have no choice but to lay Brown off because he could not work in the warehouse

due to his injury. Fox also testified that the son of vice-president Cochran was also laid off on November 1, for lack of work and added that Cochran, before he went on vacation, had told him to think about who he was going to lay off. Cochran himself testified he actually gave instructions to lay off employees. According to Fox, in addition to Brown's physical disability, he was somewhat odd in that he would catch flies and put them into his mouth. Fox related that during the period of the layoffs, suppliers to the company were hesitant in shipping materials because of overdue bills. Brown signed his union authorization card on November 22, attended the November 23 union meeting at the union hall, and on the morning of November 24 reported to work wearing two union buttons. Brown testified that in March 1983 he went back to the plant attempting to get his job back and at that time and was offered his original job in the warehouse but had to refuse the offer because his doctor still required him to perform only light work. Brown conceded on cross-examination that Fox had told him in October that some employees would get laid off, pointing to the fact that dealer trucks appearing at the plant had become fewer or less frequent.

Employee Gregory Burden testified that he was employed for several weeks by the company in 1980 or 1981 and was laid off for lack of work. He again commenced employment with the company on November 15, 1982 and was laid off by Fox on November 24. Burden testified that when he was hired on November 15 by Fox to work in the warehouse, Fox told him he would be there a long time and would move up. In his testimony, Fox denied any such remark to Burden. Fox indicated simply that Burden was laid off because of lack of work. Burden signed his union authorization card on November 24 and testified that he thinks he wore a button that morning but

is not absolutely sure. Employee Brown testified that Burden did wear a union button. Burden did not attend the union meeting on November 23.

Employee Ronald Caffee began working for the company on September 16 and had no prior experience. His immediate supervisor was Peggy Hutchinson. Caffee accompanied employees Thompson and Crouch to the union hall to obtain union authorization cards on November 22 and that same day, during the afternoon break, Caffee indicated that he passed out some four cards which were signed and given back to him. Caffee attended the union meeting on November 23 and also wore a union button the morning of November 24. Caffee was laid off after the Thanksgiving weekend on November 29 by supervisor Sandra Young, who at that time had also returned from her vacation. Young testified simply that she laid Caffee off due to a shortage of orders.

Gary Marshall first came to work for the company in November 1980 as a truckdriver. His work record with the company from that time forward to the fall of 1982 is somewhat unclear from the record. However, he did work for the company periodically until September or October 1982 when he took a leave of absence to work some where else. He apparently was rehired sometime in October or early November 1982 and testified that when he was rehired vice-president Cochran checked his work record and told him that he had been a good worker and that he could come back to work. Marshall attended the union meeting on November 23 and signed a union authorization card on November 24. Marshall also reported to work November 24 with the union button on. Marshall testified that after the layoffs on November 24, he took employees Brown and Crouch, who had been laid off, to the union hall to complain about the layoffs, and as he was leaving with Brown and Crouch the company's president, O'Neil, was observing

them. Marshall was laid off on the Monday after Thanksgiving (November 29) by Fox, who said at the time that he hated to lay him off and needed him because there was much work to be done, but that he had been told to do so.

Employee Lydia Houchens first went to work for the company in 1980 but later quit because of the illness of her daughter. Houchens testified that she was rehired by Young in August 1982 and was laid off December 1, apparently by Young. Houchens signed a union authorization card on November 22, attended the union meeting on November 23 and reported to work November 24 wearing a union button. Young testified that Peggy Hutchinson had called her attention to the fact that Houchens was making mistakes in her work. Young apparently attributes the layoff of Houchens to not only the slow-down in the work but to her performance.

There were three main organizing events regarding the union. The first was on November 22 when employees Caffee, Crouch and Thompson went to the union hall and obtained authorization cards, signed their own cards and returned to the plant and obtained completed cards from seven other employees.[8] The next event occurred on November 23 when a meeting was held at the union hall. Five of the six employees who were laid off attended that meeting.[9] Employees Stinson and Maulden also attended the meeting. Neither of these employees testified at the hearing. The third and last significant event was the

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[8]Employee Thixton's card was lost, and Thixton did not testify in the case. Those employees who signed cards at the plant on November 22 were as follows: Maulden, Campbell, Stinson, Creek, Lemons, Brown, and Houchens. Employees Marshall and Burden signed their union authorization cards on November 24.

[9]These employees were the following: Houchens, Caffee, Marshall, Brown, and Crouch.

wearing of union buttons on the morning of November 24. Of the six employees who were laid off, Caffee and Crouch participated in all three events, and also obtained fully executed authorization cards from other employees on November 22. Employees Marshall, Brown and Houchens participated in two of the events, namely attendance at the November 23 meeting and the wearing of union buttons on November 24. The sixth employee who was laid off was Greg Burden who participated in the third significant event, that of wearing a union button on November 24. All six, of course, had signed union authorization cards. Two employees, Maulden and Stinson both went to the meeting and signed union authorization cards, but there is no evidence on the record that they either did or did not wear union authorization buttons other than the fact that most of the union supporters wore the buttons on November 24. Neither Maulden or Stinson were laid off, and as indicated earlier neither testified in the case. Three other employees who had signed union authorization cards were also not laid off and again, it is not definitely certain whether one of them wore union authorization buttons on November 24.[10]

The initial burden in this case rests with the General Counsel. The General Counsel must, by a preponderance of the evidence, make a prima facie showing sufficient to support the inference that the union and protected activity of the six employees was a motivating factor in the company's decision to lay off the employees. Once this is established, the burden then shifts to the company to demonstrate, by a preponderance of the evidence, that the same action would have taken place even in the absence of the

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[10]These three employees were Lemons, Creek, and Campbell. They did not testify in the case. Crouch testified that Campbell wore a button, and Brown testified that Lemons wore a button.

protected conduct.[11] I find in this case that the General Counsel has carried its initial burden regarding the six laid off employees. These employees were all union supporters and this support was demonstrated openly on November 24. The company responded promptly and swiftly by laying off three of the supporters in the afternoon of November 24, including the two leading supporters (Crouch and Caffee), and followed quickly with two more layoffs the next regular working day, and laid off the last employee two days thereafter. In my opinion the General Counsel proved initially that there was an anti-union animus on the part of the company which contributed to the company's decision to layoff the six employees involved. In this regard, the remarks of warehouse supervisor Fox in my opinion were damaging and telling in this case. At the time, he was the highest ranking supervisor in the plant, other than the president, who had no direct contact with the employees but did confer with Fox on the fateful morning of November 24. The three initial discharges took place in the absence of the supervisor of those employees, who was due to return the next regular working day, and also in the absence of vice-president Cochran, who had overall responsibility for the day-to-day operations of the plant and who was also due to return later the following week. It is the swiftness and the timing of the layoffs that is most damaging to the company. The General Counsel having sustained its initial burden, that burden then shifted to the company to show that unprotected activities, standing alone, would have caused the layoffs. I find that burden was not sustained by the com-

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[11] *Wright Line*, 251 NLRB 1083, 105 LRRM 1051 (1980); enf'd 662 F. 2d 899, 108 LRRM 2513, cert. denied 455 U. S. 989, 109 LRRM 2779; *Wright Line* test upheld in *N.L.R.B.* v. *Transportation Management Corp.* 103 U. S. 2469, 112 LRRM 2857 (1983).

pany. It is clear cut in this case that the company's production was seasonal and that the company had indeed fallen on bad times economically. There is also no doubt in my mind that there would have eventually been layoffs. However, I must deal in this case with the situation and circumstances that actually existed on the various dates of the layoffs. The company's own production figures reflect that the major decrease in business did not occur until December. It could be argued in this case that foreseeing some layoffs, the company desired to save vacation pay or in some other manner curtail certain expenses by beginning the layoffs on the heels of a holiday period. However, there is absolutely no direct evidence in the record to support the same. On the contrary, there is evidence in the record to the effect that at least some notice was given to employees in advance of their layoffs in the past. Considering all the evidence and circumstances in this case, I find that the company's asserted reasons for the layoffs do not withstand scrutiny and were thus pretextual, and that the legitimate business reasons asserted by the company for the layoffs on the dates they occurred was too insubstantial to overcome the direct and indirect evidence of a motivation to frustrate the union organization. Accordingly, I find and conclude that the six layoffs involved in this case were violative of Section 8(a)(1) and (3) of the Act.

F. *The Cards, the Union's Majority, and the Appropriate Unit*

There were eleven signed union authorization cards admitted into evidence in this case. Six of the cards were authenticated by the actual signers in testimony. The remaining five cards were appropriately and adequately authenticated by the testimony of either employee Marshall,

Crouch or Caffee. I allowed arguments to be presented in the briefs filed herein regarding the admittance of three cards signed by employees Campbell, Creek and Lemons. Regarding these three cards, the company argues in this case that these cards and all the other cards were tainted and thus improperly admitted because of the purpose for signing the cards. None of the cards were defective on their face and all were completely executed and properly signed by the employee involved. Employee Campbell was told by employee Caffee that the card was "for getting a union started." The cards were initially obtained when Caffee, Thompson and Crouch went to the union hall during their break on November 22. Caffee did testify that at that time he and the other two employees signed their cards to save their jobs or prevent being laid off. However, he additionally indicated that their purpose was to get the union in at the plant. In this regard, Robert Winstead, an assistant to the union's president, testified that he told the employees who attended the November 23 meeting that the cards were membership cards, would be a showing of interest in the union, and further added that if they were discriminated against, the date on the card was important because on and after that date their union support would be protected activity. Winstead did indicate that at the meeting potential layoffs were also discussed. Employee Marshall gave employee Lemons his card and asked him to sign it "to try to get the union started." Lemons kept the card for at least one day before he returned it to Marshall and Lemons also wore a union button the morning of November 24. Employee Creek was handed her card by employee Crouch who indicated that she watched Creed read the card, fill in all the blanks and sign the card. Creek also wore a union button on November 24.

The union authorization cards admitted in the case were single purpose cards and properly authenticated. The

cards on their face were unambiguous and clearly stated that the signer authorized the union to represent the signer for the purpose of collective bargaining, and not merely to seek an election. Such cards are valid unless it is proved that the employee who signed the card was told that the card was to be used solely for the purposes of obtaining an election.[12] Such cards remain valid not withstanding the fact that in addition to the language on the face of the card, the employees are told about various other purposes such as for their own protection, to protect their jobs in the case of discrimination, or to get the union started. Furthermore, the action of the union supporters on the morning of November 24 in wearing union buttons was most certainly protected and concerted union activity, reflecting a desire of those employees to be represented by the union. The record in this case reflects that at least nine out of the eleven card signers wore union buttons on the morning of November 24. I find and conclude that all eleven of the union authorization cards were properly admitted in this case for the purposes of showing a majority support for the union in the appropriate unit involved in this case.

On November 24 there were 19 employees in the unit involved, including Peggy Hutchinson, who the General Counsel contends should not be in the unit by virtue of being a supervisor under Section 2(11) of the Act. Hutchinson was Supervisor Young's assistant in the production

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[12]*NLRB* v. *Gissel Packing Co. Inc.*, 295 U. S. 575, 71 LRRM 2481 (1969), upholding the Board's validity tests in *Cumberland Shoe Corp.*, 144 NLRB 1268, 54 LRRM 1233 (1963) and *Levi Strauss & Co.*, 192 NLRB 732, 68 LRRM 1338 (1968). See also *Montgomery Ward & Co.*, 253 NLRB 196, 105 LRRM 1497 (1980).

department.[13] Hutchinson did not sign a union authorization card but employee Garland Brown did sign a card and the company takes the position that Brown was a guard within the meaning of Section 9 (b)(3) of the Act and thus should not be included in the appropriate bargaining unit. With the eleven union authorization cards admitted, the union represents a majority of the employees in the unit whether or not Hutchinson or Brown are included in the unit. Thus, I find it unnecessary in this case to resolve the issue of inclusion or exclusion of Hutchinson and Brown from the unit.[14] Accordingly, I find and conclude that from November 24 foreward, the union represented a majority of those employees in the unit.

The complaint alleges that the appropriate unit of employees in the company for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

> All production, maintenance, warehouse and truck-driving employees employed at the company's Louisville, Kentucky facility; but excluding all office clerical, professional and all other employees and all guards and supervisors as defined in the Act.

In its answer filed herein, the company denies the appropriateness of this unit. However, the company did stipulate to the appropriateness of the unit in the representation proceeding (9-RC-14186) and produced no evidence or argument at the hearing regarding the appropriateness

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[13]These employees are named in the papers attached to the Stipulation for Certification Upon Consent Election (Case No. 9-RC-14186) which was admitted into evidence.

[14]From the record in this case, my initial impressions would lead me to conclude that Hutchinson should not be included in the unit, but Brown would be properly included.

of the unit. I thus find and conclude that the above stated unit is an appropriate unit in the circumstances of this case for the purpose of collective bargaining within the meaning of the Act.

Upon the foregoing findings of fact and initial conclusions, and upon the entire record, I hereby make the following:

Conclusions of Law

1. That the Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. That the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. That the Respondent, acting through its foreman and agent Charlie Fox, on November 24, 1982 at its Louisville, Kentucky facility, made disparaging remarks to an employee regarding employees who supported the union, identifying one such employee, thereby implying and giving employees the impression of surveillance of their union activities.

4. That the Respondent, acting through its foreman and agent Charlie Fox, on or about November 24, 1982 at its Louisville, Kentucky facility, threatened an employee by stating to said employee that the Respondent would discharge employees who supported the union and would close its facility because of the union activity of employees.

5. That the Respondent, acting through its foreman and agent Charlie Fox, on November 24 at its Louisville, Kentucky facility, threatened employees with discharge for engaging in the protected concerted activity of wearing union buttons.

6. That the Respondent, acting through its foreman and agent Charlie Fox, on November 24, 1982 at its Louis-

ville, Kentucky facility informed an employee that the Respondent knew which employee had signed union authorization cards and thereby gave employees the impression that their union activities were under surveillance.

7. That the acts and actions of the Respondent as set forth in paragraph numbers 3 through 6, above, constituted improper interference, restraint and coercion of employees by the Respondent in the exercise of their rights guaranteed in Section 7 of the Act, and are thus violative of Section 8(a)(1) of the Act.

8. That the Respondent violated Section 8(a)(1) and (3) of the Act by improperly laying off the following named employees, on the dates appearing after their names, because they engaged in protected concerted activity in support of the union:

Gregory John Burden	—	November 24, 1982
Garland Brown, Jr.	—	November 24, 1982
Donna Jean Crouch	—	November 24, 1982
Ronald Caffee	—	November 29, 1982
Gary Wayne Marshall	—	November 29, 1982
Lydia Houchens	—	December 01, 1982

9. That the Charging Union is, and has been since its demand for recognition by the Respondent on November 24, 1982, the exclusive collective bargaining representative of the Respondent's employees in the following appropriate unit:

> All production, maintenance, warehouse and truckdriving employees employed at the company's Louisville, Kentucky facility; but excluding all office clerical, professional and all other employees and all guards and supervisors as defined in the Act.

10. That on and after November 24, 1982, the Respondent unlawfully refused to recognize and bargain with the Charging Union regarding the terms and conditions of employment of the employees in the above unit, in violation of Section 8(a)(1) and (5) of the Act.

11. That the unfair labor practices found in paragraphs 3 through 6, 8 and 10, above, effect commerce within the meaning of the Act.

The Remedy

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act and the discriminatory layoffs of six of the employees out of the unit of at least eighteen employees in violation of Section 8(a)(1) and (3) of the Act and found herein are pervasive, I will recommend a so-called broad order designed to surpress any and all violations of those Sections of the Act.[15]

Having found that the Respondent unlawfully laid off the six named employees, I shall also recommend that said employees be offered immediate and full reinstatement to their former positions, or if those positions no longer exist, to a substantially equivalent position without prejudice to their seniority or other rights and privileges. The evidence in this case reflects that most, if not all of the laid off employees have since been reinstated or called back to work. To the extent that they have been reinstated, that portion of the remedy requiring the same is of course moot. In this regard, however, I shall further recommend that

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[15] *Hickmott Foods, Inc.*, 242 NLRB 1357, 101 LRRM 1342 (1979).

the Respondent be required to make those six employees whole for any loss of earnings that they may have suffered by reason of the discrimination against them, by paying them a sum of money equal to the amount they would normally have earned as wages from the dates of their layoff to the date of the Respondent's reinstatement, or offer of reinstatement, less net earnings, with backpay and interest thereon to be computed in the manner prescribed by appropriate Board law.[16] Shouldt his case reach the compliance stage, the Respondent should be allowed to offer evidence and proof that any one or all of the six employees who were laid off would have, in any event, been legitimately laid off subsequent to their discriminatory layoff found herein, in order to adequately and fairly mitigate any amounts that may be due as lost wages. I shall further recommend that the company be required to preserve and make available to Board agents, upon request, all pertinent records and data necessary to analyze and determine whatever backpay may be due.

The General Counsel has asked that the Respondent be ordered to recognize and bargain with the charging union in this case. Such a remedy has been deemed and held appropriate where the employer's conduct was so pervasive and so outrageous as to prevent the holding of a free and uncoerced election, and also where the General Counsel has shown that the union had obtained valid authorization cards from a majority of the employees in the appropriate bargaining unit and it also has been shown that the employer's violations were less extraordinary and pervasive but nonetheless still had the tendency to undermine the union's majority strength and impede the election

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[16] *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Also see generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

process.[17] I find that this case falls within the latter category and, as requested, I shall recommend that the Respondent be ordered to recognize the charging union as the collective bargaining representative of the employees in the appropriate unit in this case, and upon request, bargain with the union over the terms and conditions of employment of the employees in said unit.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

The Respondent, Quality Aluminum Products, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Laying off employees or otherwise discriminating against them for supporting the General Drivers, Warehousemen and Helpers Local Union No. 89, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

(b) Creating in the minds of employees the impression that their union activities and the union activities of other employees are the subject of company surveillance.

(c) Threatening employees with discharge if they support the above-named union, or any other union.

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[17] *NLRB* v. *Gissel Packing Co., supra.*

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Refusing to recognize and bargain collectively with above named union as the exclusive collective bargaining representative of all of the Respondent's production, maintenance, warehouse and truck driving employees employed at the Respondent's Louisville, Kentucky facility.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer Ronald Caffee, Donna Jean Crouch, Gary Wayne Marshall, Gregory John Burden, Garland Brown, Jr., and Lydia Houchens immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy of this Decision.

(b) Recognize and, upon request, bargain collectively in good faith with General Drivers, Warehousemen and Helpers Local Union No. 89, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of all production, maintenance, warehouse and truck driving employees employed at the Respondent's Louisville, Kentucky facility.

(c) Post at the Respondent's place of business in Louisville, Kentucky, copies of the attached Notice marked "Appendix."[19]

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[19]In the event that the Board's Order is enforced by a judgment by the United States Court of Appeals, the words in the

(Footnote Continued on Next Page)

Copies of said notice, on forms to be provided by the Regional Director for Region 9, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily placed. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered up by any other material.

d) Preserve and, upon request, make available to the Board or its agents, for examination and copying all payroll records, social security records, and reports, and all other records necessary to analyze the amount of backpay due herein.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. March 28, 1984

(s) Russell M. King, Jr.
Russell M. King, Jr.
Administrative Law Judge

(Footnote Continued From Preceding Page)

notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE
FOR FILMING: 50a

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT create in the minds of employees the impression that their union activities and the union activities of other employees are the subject of company surveillance.

WE WILL NOT threaten to discharge employees because of their union support or protected union activities.

WE WILL NOT threaten employees with closure of the Louisville, Kentucky facility if employees engage in union support or activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Ronald Caffee, Donna Jean Crouch, Gary Wayne Marshall, Gregory John Burden, Garland Brown, Jr., and Lydia Houchens immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL recognize, and upon request, bargain collectively in good faith with GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive collective-bargaining representative of all of our production, maintenance, warehouse and truck driving employees employed at our Louisville, Kentucky facility.

QUALITY ALUMINUM PRODUCTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3003 Federal Office Building, 550 Maine Street, Cincinnati, OH, 45202, Telephone No. (513) 684-3686.

Supreme Court, U.S.
FILED
AUG 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1947

In the Supreme Court of the United States

OCTOBER TERM, 1987

QUALITY ALUMINUM PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unfair labor practices precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is reported at 813 F.2d 795. The decision and order of the National Labor Relations Board (Pet. App. 7a-19a) are reported at 278 N.L.R.B. No. 49.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1987. The petition for a writ of cer-

tiorari was filed on June 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells aluminum doors and windows (Pet. App. 23a). This is a seasonal business, and petitioner regularly lays off employees during its slack period in the winter (Pet. App. 24a-25a, 26a).

On November 22, 1982, three of petitioner's employees signed and distributed to other employees authorization cards they had obtained at Union [1] headquarters (Pet. App. 8a-9a, 24a). The following day seven employees attended a Union meeting (*id.* at 9a, 24a). By November 24, a majority of petitioner's employees had signed authorization cards (*id.* at 10a, 42a) and the Union requested that petitioner recognize it as the employees' bargaining representative. Petitioner refused to do so (*id.* at 24a).

Most of the employees who had signed authorization cards wore Union buttons to work on November 24 (Pet. App. 9a, 24a). On that day, Warehouse Supervisor Charles Fox made four anti-union statements to employees. First, he told an employee who was wearing two Union buttons that " 'these mother ———— wouldn't be wearing them buttons if it wasn't for that bitch back there in the back' "—a reference to one of the leading Union partisans. About an hour later, Fox stated to the same person that " '[the employees] were fools for signing those union cards' " (*id.* at 9a, 26a (quotation marks and

[1] General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

brackets in original)). Fox also told an employee, in the presence of two others, that " 'if he didn't want to jeopardize his job, he'd better take the buttons off' " (*id.* at 9a, 27a (quotation marks in original)). He subsequently told the two employees who heard the preceding statement that petitioner would "close the doors" or "shut the doors" if the Union came in (*id.* at 9a, 27a).

Petitioners laid off six of the 17 to 19 employees who comprised the appropriate bargaining unit:[2] three on November 24; two more on the next working day, November 29; and a sixth employee on December 1 (Pet. App. 9a-10a, 31a-36a). All six laid-off employees had signed Union authorization cards and had worn Union buttons to work on November 24; five had attended the November 23 union meeting, and two had distributed cards to other employees (*ibid.*).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by creating the impression of surveillance of union activities, by threatening employees with discharge for wearing union buttons, and by threatening employees with plant closure (Pet. App. 8a, 29a), and that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158 (a)(3) and (1), by laying off six employees because of their union activities (Pet. App. 8a, 38a-39a). The Board further found that petitioner's unfair labor practices impeded the election process to such an extent that traditional remedies could not ensure a fair election, and that employee sentiment, as in-

[2] The bargaining unit consisted of petitioner's production, maintenance, warehouse, and truckdriver employees (Pet. App. 42a-43a).

dicated by the authorization cards signed by a majority of the unit employees, would, on balance, be better protected by a bargaining order (*id.* at 8a-15a). In so finding, the Board relied on the following facts: the violations were "extensive in number and pervasive in terms of the number of unit employees they affected" (*id.* at 10a); the violations were "highly coercive" (*ibid.*); and the bargaining unit was small (*ibid.*). The Board also relied on the swiftness and timing of the unfair labor practices (*id.* at 11a), the lingering coercive impact of the unfair labor practices in view of the continued presence of most of the employees affected (*ibid.*), the likelihood of future layoffs, which would lead employees to fear a repetition of the unlawful conduct (*id.* at 11a-12a), and the absence of any change in management or disavowal of the unlawful threats (*id.* at 12a). The Board further concluded that the passage of time was not sufficient to eradicate the lasting effects of petitioner's conduct (*id.* at 13a). To remedy the unfair labor practices, the Board ordered petitioner, inter alia, to bargain with the Union (*id.* at 16a).

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. 2a-6a). The Court found that substantial evidence supported the Board's findings of violations and that the Board did not abuse its discretion in determining that a bargaining order was an appropriate remedy (*id.* at 4a). Judge Krupansky dissented. He said that while he could join in affirming the Board's finding that petitioner committed unfair labor practices, he did not agree with the remedial measures the Board had ordered (*ibid.*).

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding that petitioner in fact unlawfully threatened to close the plant and to discharge union supporters and then unlawfully selected employees for lay-offs because of their union activities. Rather, petitioner contends that the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 3-4. But the court's decision is correct and does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may order an employer to bargain with a union not selected in a board election both in "'exceptional'" cases marked by "'outrageous' and 'pervasive' unfair labor practices" (395 U.S. at 613-614, quoting *NLRB* v. *Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967)), and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (395 U.S. at 614). The Court found that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain'" (395 U.S. at 610, quoting *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * is slight and that

employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

The decision below follows straightforwardly from *Gissel*. The court found substantial evidence to support the Board's findings that a fair election could not be assured by traditional remedies and that a bargaining order was appropriate in light of petitioner's unlawful threats of plant closure and job loss and petitioner's realization of those threats by laying off approximately one-third of the unit employees. Since these are precisely the circumstances in which the Court in *Gissel* contemplated that the Board would issue a bargaining order—to prevent an employer from "delay[ing] or disrupt[ing] the election processes [or from] put[ting] off indefinitely his obligation to bargain" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 610-611 (footnote omitted))—the court's decision to uphold such an order was correct. Indeed, in one of the companion cases decided with *Gissel* (*Sinclair Co.* v. *NLRB*, 395 U.S. 575, 587-590, 615 (1969)), the Court affirmed a decision of the First Circuit enforcing a Board-issued bargaining order that was based solely on threats of plant closure.[3]

2. Petitioner contends (Pet. 4) that the courts of appeals have adopted "divergent interpretations of

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[3] Petitioner suggests (Pet. 3) that the impact of its unlawful layoffs was minimized by the fact that it regularly laid off employees due to the seasonal nature of its business. However, as the Board stated (Pet. App. 11a-12a), the regularity of layoffs exacerbated the lingering effect of petitoner's selection of employees for layoff based on their union activities: "With future seasonal layoffs likely, the [petitioner's] employees have reason to fear a recurrence of a similar attempt."

the application of the *Gissel* criteria." This contention has no merit.

The courts of appeals do not need any additional instruction from this Court concerning the findings and analysis that the Board must make to justify issuance of a *Gissel* bargaining order. The courts uniformly hold that the Board may issue a bargaining order only if it explains why a fair and reliable election cannot otherwise be conducted. See, *e.g.*, *NLRB* v. *Permanent Label Corp.*, 657 F.2d 512, 521 (3d Cir. 1981) (en banc), cert. denied, 455 U.S. 940 (1982); *NLRB* v. *Maidsville Coal Co.*, 718 F.2d 658, 659-661 (4th Cir. 1983) (en banc), cert. denied, 465 U.S. 1079 (1984); *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir. 1981); *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d 22, 30 (1st Cir. 1985); *NLRB* v. *Gordon*, 792 F.2d 29, 33 (2d Cir. 1986), cert. denied, No. 86-392 (June 8, 1987).[4] There is no doctrinal confusion for this Court to clear up. In this case, the Board set forth in detail the factors upon which it relied in concluding that petitioner's unfair labor practices would have a lingering

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[4] Petitioner's assertion of a conflict rests largely on panel decisions that have been superseded by en banc decisions. Thus, the suggestion of "hostility" to bargaining orders in *NLRB* v. *K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981) (see Pet. 5) has been dispelled by the en banc opinion in *NLRB* v. *Permanent Label, supra*; see *United Oil Mfg. Co.* v. *NLRB*, 672 F.2d 1208, 1213 (3d Cir.), cert. denied, 459 U.S. 1036 (1982). Similarly, the panel decision in *NLRB* v. *Maidsville Coal Co.*, 693 F.2d 1119 (4th Cir. 1982), on which petitioner also relies (Pet. 6), was withdrawn on rehearing en banc, and the Board's bargaining order was enforced. 718 F.2d 658, 659-661 (4th Cir. 1983), cert. denied, 465 U.S. 1079 (1984).

effect and would preclude the holding of a fair election.[5] No court of appeals requires the Board to do more.

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[5] The cases petitioner cites (Pet. 6-7), in which courts of appeals have denied enforcement of Board orders, are distinguishable. In *NLRB* v. *Appletree Chevrolet*, 608 F.2d 988, 997-998 (1979), which predates the Fourth Circuit's en banc decision in *Maidsville Coal*, the Board had made no findings as to the residual impact of the unfair labor practices or the potential impact of traditional remedies. Moreover, the court reversed the finding of discriminatory discharges that was the principal basis for the Board's bargaining order. 608 F.2d at 992-996, 998. In *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 119-120 (1st Cir. 1978), the Board also used only conclusory language; it was silent as to the future impact of the unfair labor practices and did not explain why traditional remedies would be inadequate in the circumstances. In addition, the supervisor who committed the unfair labor practices had left the company's employ along with four of the eight unit employees, and the violations ceased when higher management was apprised of them. *Id.* at 120. Similarly, in *Red Oaks Nursing Homes, Inc.* v. *NLRB*, 633 F.2d 503, 509, 511 (7th Cir. 1980), which involved neither unlawful discharges nor layoffs, the Board made only conclusory statements and failed to consider the relevant factors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40471